PJD LANDMARKS SDN BHD v. SOH JIEN MIN & ORS

HIGH COURT MALAYA, SHAH ALAM
TEE GEOK HOCK JC
[CIVIL APPEAL NO: BA-12ANCvC-14-01-2022]
8 JUNE 2022

Abstract – *After having signed settlement agreements with and having collected the settlement sums from the developer in connection with late delivery of housing units and late completion of common facilities under the sale and purchase agreements, purchasers cease to have any cause of action for liquidated damages for delay in delivery and completion under the same sale and purchase agreements.*

CIVIL PROCEDURE: *Striking out – Application for – Application by developer to strike out claim by purchasers – Purchasers commenced claim for liquidated damages against developer after signing settlement agreements and collecting settlement sums – Late delivery of vacant possession and delay in completion of common facilities – Whether original causes of action superseded by settlement agreements – Whether purchasers ceased to have right to sue on superseded original causes of action – Whether claim obviously unsustainable – Whether there were triable issues – Whether clear and obvious case for summarily striking out of suit – Rules of Court 2012, O. 18 r. 19*

The appellants ('plaintiffs') were purchasers who had signed their respective sale and purchase agreements ('SPAs') with the respondent ('defendant') who was a developer, in the Schedule H format of the Housing Development (Control and Licensing) Act 1966 ('Act'). The defendant gave notices of handing over vacant possession of the housing units to the plaintiffs and the acknowledgment of receipt of keys and inspection of premises were duly signed by the plaintiffs. The plaintiffs signed letters of settlement in connection with the late delivery of their respective housing units under the SPAs and also received payments of the settlement sums. However, the plaintiffs commenced a joint court suit at the Sessions Court against the defendant to claim for the liquidated damages under the same SPAs. The defendant applied under O. 18 r. 19 of the Rules of Court 2012 ('ROC') to strike out the plaintiffs' suit on various grounds, including the ground of absence of *locus standi* or subsisting cause of action by reason of the settlement agreements. The Sessions Court dismissed the defendant's application. Hence, this appeal.

Held (allowing appeal; ordering action and claims be struck out with costs):

(1) There was nothing in the Act which impliedly prohibits the contracting parties in dispute or controversy to enter into binding and enforceable settlement agreements or consent judgments for compromise and

settlement of their disputes or controversies in connection with the sale and purchase transactions of residential properties after the completion of the development and construction of the residential properties or after the dispute had arisen between the parties. (para 36)

(2) The settlement agreements were signed between the defendant and each of the plaintiffs to fully and finally settle the plaintiffs' original causes of action in respect of the delay in delivery of vacant possession and the delay in completion of common facilities. None of the plaintiffs pleaded or alleged any vitiating circumstance which could be argued as having invalidated any of the settlement agreements as a contract. In the premises, the original causes of action of the plaintiffs in respect of delivery of vacant possession and delay in completion of common facilities under the original SPAs had been superseded by the settlement agreements and the plaintiffs ceased to have any right to sue on such superseded original causes of action. As the causes of action were merged into and became the subject of the settlement agreements and the settlement agreements had been fully implemented by the defendant, there was no remaining of residual cause of action for any of the plaintiff to sue the defendant in respect of the delivery of vacant possession and delay in completion of the common facilities. (paras 37 & 38)

(3) The plaintiffs' claims against the defendant, which were in respect of the delay in delivery of vacant possession and the delay in completion of the common facilities, were obviously unsustainable and/or were clearly bound to fail and/or had no chance of success. Hence, there was no triable issue for the present suit to proceed to trial. The subordinate court had erred in law and/or in principle in dismissing the defendant's application for striking out the present action. This was a clear and obvious case for summarily striking out the plaintiffs' suit under O. 18 r. 19 of the ROC. (paras 40-43)

Case(s) referred to:

Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals [2020] 1 CLJ 162 FC ***(refd)***

Chin Kok Woo & Ors v. Sky Park Properties Sdn Bhd & Ors [2022] 4 CLJ 716 HC ***(refd)***

Encony Development Sdn Bhd v. Robert Geoffrey Gooch & Anor [2016] 1 CLJ 893 CA ***(refd)***

Majlis Perbandaran Seremban v. Tenaga Nasional Bhd [2020] 10 CLJ 715 FC ***(refd)***

Obata Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Other Cases [2021] 10 CLJ 596 HC ***(refd)***

Oxbridge Height Sdn Bhd v. Abdul Razak Mohd Yusof & Anor [2015] 2 CLJ 252 CA ***(refd)***

Pacific Sanctuary Holdings Sdn Bhd v. Masaland Construction Sdn Bhd [2020] 4 CLJ 490 CA ***(refd)***

Pinpoint Consortium (M) Sdn Bhd v. Mammoth Empire Land Sdn Bhd [2020] 5 CLJ 281 HC ***(refd)***

PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals [2021] 2 CLJ 441 FC ***(refd)***
Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***
Stone Master Corporation Bhd v. Dato Koh Mui Tee & Ors; Dato' Lee Fong Yin (Third Party) [2019] 1 LNS 1571 HC ***(refd)***

Legislation referred to:
Civil Law Act 1956, ss. 7(3)(iv), 28A(2)(c), (d)
Consumer Protection Act 1999, s. 69
Contracts Act 1950, s. 75
Employment Act 1955, s. 13
Housing Development (Control and Licensing) Act 1966, ss. 8A, 16B, 16O, 16P, 16T, 16AB, 16AC
Rules of Court 2012, O. 18 r. 19, O. 22A, O. 34 r. 2(2)(a), O. 46 r. 2(1)
Sale of Goods Act 1957, ss. 55, 56, 57, 59, 61

For the appellant - Bahari Yeow Tien Hong & Kuhan Manokaran; M/s Rosli Dahlan Saravana Partnership
For the respondent - Chandni Anantha Krishnan, Syarisa Rozlan & Vanessa Victor; M/s Lui & Bhullar

Reported by Lina E

JUDGMENT

Tee Geok Hock JC:

Introduction

[1] After having signed the settlement agreements with, and having collected the settlement sums from the appellant-developer in connection with late delivery of their respective housing units under the sale and purchase agreements, the respondents-purchasers commenced the joint court suit in the present case against the appellant-developer to claim for the liquidated damages under the same sale and purchase agreements.

[2] In the Sessions Court, the defendant-developer applied under O. 18 r. 19 of the Rules of Court 2012 ("ROC 2012") to strike out the plaintiffs-purchasers' suit on various grounds including the ground of absence of *locus standi* or subsisting cause of action by reason settlement agreements.

[3] After the Sessions Court dismissed the defendant-developer's O. 18 r. 19 of the ROC 2012 application, the defendant-developer appealed to the High Court.

[4] On 29 April 2022, this court allowed the defendant-developer's appeal on the ground that after having signed settlement agreements with, and having collected the settlement sums from, the defendant-developer in connection with late delivery of their respective housing units and late completion of common facilities under the sale and purchase agreements, the

plaintiffs-purchasers ceased to have any cause of action for liquidated damages for delay in delivery and completion under the same sale and purchase agreement.

[5] Being dissatisfied with the said decision, the plaintiffs-purchasers have appealed to the Court of Appeal.

Legal Principles On Striking Out

[6] It is trite law that O. 18 r. 19 of the ROC 2012 striking out of a plaintiff's suit is only to be resorted to in clear and obvious case where the plaintiff's action is frivolous, vexatious, or an abuse of the process. Where the plaintiff's action is obviously unsustainable or has no chance of success, the plaintiff's action is frivolous, vexatious, or an abuse of the process and can be summarily struck out.

[7] While the courts are very reluctant to summarily strike out a suit on ground relating to the substantive merits of the case, the courts have in suitable cases allowed the summary striking out of court suits on one of these grounds, namely, where it is clear and obvious that (i) the limitation period has expired, (ii) the plaintiff has no *locus standi*, (iii) the action is barred by *res judicata*, (iv) the action is incompetent, (v) the action is barred by statute, (vi) the subject-matter in the action is non-justiciable and (vii) the court has no jurisdiction to grant the relief or remedy prayed for in the action.

[8] Where the subject-matter in the suit has been amicably settled, the court will strike out the suit on the ground that the action thereafter becomes academic or incompetent. In *Raja Zainal Abidin Raja Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606, the Supreme Court held that on the interpretation of the terms of settlement letter signed between the plaintiffs and the seventh defendant, the plaintiff agreed as part of the settlement to withdraw the suit against the defendants and therefore the Supreme Court struck out the entirety of the plaintiffs' suit against all the defendants as it was bound to fail.

Facts Which Are Undisputed And/Or Indisputable

[9] The plaintiffs-purchasers signed their respective sale and purchase agreements with the defendant-developer in the Schedule H format of the Housing Development (Control and Licensing) Act 1966. Copies of the sale and purchase agreements were exhibited to the defendant-developer's affidavit-in-support which have been reproduced in the appeal records (rekod rayuan or "RR").

[10] By letters dated 5 July 2016, the defendant-developer gave notices of handing over vacant possession of the housing units to the plaintiffs-purchasers (exh. "F" to defendant's affidavit-in-support in appeal records RR(J4)/pp. 701 to 713; encl. 7).

[11] Acknowledgement of receipt of keys and inspection of premises were signed by the plaintiffs-purchasers in August 2016: (exh. "G" to defendant's affidavit-in-support in RR(J4)/pp. 714 to 729; encl. 7). A

[12] The respective letters of settlement dated 16 August 2016 (exh. "H" to defendant's affidavit-in-support in RR(J4)/pp. 730 to 742; encl. 7) were signed by the defendant and each of the plaintiffs herein. The signed and executed letter of settlement constituted a settlement contract between the signatories. B

[13] The terms of the respective letter of settlement, wherein the expression "I/We" refers to each plaintiff-purchaser, are as follows: C

> 1. I/We hereby agree that the amount of liquidated damages due and payable in respect of late delivery of the aforesaid unit and common facilities shall be [the specific amount in RM] (hereinafter referred to as the "LAD Sum").
>
> 2. I/We hereby *agree to accept the "LAD Sum" as full and final settlement of my/our claims arising from and/or in connection with the late delivery of the aforesaid unit and common facilities.* D
>
> *3. Upon acceptance of the "LAD Sum", I/we undertake not to make any claim or take any further proceedings of whatsoever nature against the Developer arising from and/or in connection with the late delivery of the aforesaid unit and common facilities.* E
>
> 4. For avoidance of doubt, I/we understand and accept that this payment of the "LAD Sum" does not constitute any admission of liability on the part of the Developer, its servants, agents or its successors in title, with regard to the late delivery of the aforesaid unit and common facilities and that this offer of payments is merely a gesture of goodwill on the part of the Developer to settle all such claims amicably. F
>
> (emphasis added)

[14] Payments of the settlement sums, also described as "LAD Sum" in each settlement agreement, were received and acknowledged by the plaintiffs: (exh. "I" to defendant's affidavit-in-support in RR(J4)/pp. 743 to 760; encl. 7). G

[15] In our present case, there is no pleading or allegation by any of the plaintiffs-purchasers that his/her consent and signing of the respective letter of settlement was in any way obtained or procured by fraud, coercion, misrepresentation, duress or any other vitiating circumstances recognised by the Contracts Act 1950 as invalidating the signing of the letter of settlement. H

Legal Principles On Settlement Agreement

[16] In *Oxbridge Height Sdn Bhd v. Abdul Razak Mohd Yusof & Anor* [2015] 2 CLJ 252; [2014] MLJU 1932 the Court of Appeal held that a settlement agreement signed between the developer and the purchasers did not constitute contracting out of the statute and therefore was valid. In that case, the Court of Appeal held: I

A On a proper reading of this decision, we do not believe the Court of Appeal was totally excluding any question of waiver of LAD, especially conditional waiver. The Court of Appeal broached the possibility of compliance with a provision being excused by making a proper representation to the authorities. On the facts of this present appeal, this was exactly what transpired. The JPN was brought into the picture and
B kept fully appraised of the status of the housing project and the proposal of a settlement agreement to move the development forward to completion with a new completion date and a new date for calculating LAD. In the end, the property was completed and delivered to the respondents within the extended time. The developer also waived late payment interest. We have earlier alluded to cl. 2.5 which provided that
C in the event vacant possession was not delivered on "the new completion date in the manner provided in the principal agreement", "the purchaser shall be at liberty to make a claim for the LAD as if this extension of time was not granted." Thus, even in the settlement agreement there was no total contracting out of the LAD provision in the SPA. If delivery of
D vacant possession had not been delivered by the new completion date, the respondents would have been at liberty to sue on the basis of the original LAD provision. We therefore found that on the peculiar facts of this appeal, there was no full contracting out and no situation where the purpose of the housing legislation being "to protect the weak against the strong" was ousted. *In terms of policy, there should be nothing illegal in law for*
E *a Settlement Agreement to be negotiated with the full participation and direction from JPN with a view to save a failing housing project from being an abandoned project. It will be in the public interest, and in the interest of house buyers, if the law allowed a regulated settlement and waiver of LAD on terms as specified in the settlement agreement which was the subject matter of this appeal. It was therefore not right and proper for the respondents, despite their promise to conditionally waive LAD under*
F *the SPA, to resile from their promise and sue for late delivery under the SPA as if the settlement agreement did not exist*.

(emphasis added)

[17] *Encony Development Sdn Bhd v. Robert Geoffrey Gooch & Anor* [2016] 1 CLJ 893 (COA, Nallini Pathmanathan JCA (now FCJ)) can also be
G referred to. In *Encony Development* case, the developer terminated SPA on ground of purchasers' failure to pay progress billings. In a suit by the purchaser to challenge the termination of SPA, the purchasers alleged that there were oral representations and collateral promises made by the developer prior to the signing of SPA and pursuant to the oral representations
H and collateral promises the developer's termination was wrongful. The COA held that the written terms of the statutory SPA governed the parties' contractual relationship for the sale and purchase of residential property and no parole evidence or external terms could be imported into the SPA contract. The COA also held there was no evidence of pre-contract oral
I representations or collateral promises as alleged.

[18] There are decided authorities which held that the developer and the purchasers cannot contract out of the statute by purporting to sign supplemental agreement or collateral document to vary or change the terms of the statutory sale and purchase agreement in the Schedule to the Housing Development (Control and Licensing) Act 1966. Such decided authorities include *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162 (Federal Court) and explained in *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 2 CLJ 441 (Federal Court).

[19] In principle and nature, there is a difference between (i) a sale and purchase agreement with terms which purport to contract out of the express statutory provisions applicable to the subject-matter of the agreement and (ii) a subsequent and separate settlement agreement which involves a compromise and settlement of disputes or claims between the contracting parties after the completion of the project.

[20] Compromise and settlement by way of settlement are often resorted to by contracting parties who have disputes or disagreements with each other at a time whether before or after the filing of a court suit. Such settlement agreements are encouraged by our system of administration of justice as a useful tool in expeditious and economical disposal of cases and disputes, and are enforceable under the law as binding contracts between the parties unless it is specifically prohibited by a statute or unless there is any vitiating circumstance, as in the case of any contract, which invalidates the settlement agreement.

[21] In *Pacific Sanctuary Holdings Sdn Bhd v. Masaland Construction Sdn Bhd* [2020] 4 CLJ 490, [2020] 3 MLJ 692 Kamardin Hashim JCA in the judgment delivered on behalf of the Court of Appeal held to the effect that a plaintiff who has obtained a judgment or an order against a defendant but has subsequently executed a settlement agreement with the latter in respect of the same cause of action is barred from taking any further action on the said judgment or order, including for its due execution under O. 46 r. 2(1) of the ROC 2012. The settlement agreement thus entered into has the effect of superseding or extinguishing the earlier judgment or order, with the result that there is no longer any pending judgment or order of court to be enforced between the parties.

[22] Where a post-judgment settlement agreement can supersede or extinguish an earlier judgment of the court which has adjudged on the rights and liabilities of the parties, there seems to be no objection in principle for a post-completion settlement agreement made before any court judgment to similarly extinguish the original cause of action under an earlier sale and purchase contract.

[23] Flowing from the principle decided by the Court of Appeal in *Pacific Sanctuary Holdings* case (*supra*), a plaintiff who has signed a contract with a defendant but has subsequently executed a settlement agreement with the latter in respect of the entire causes of action under the original contract is barred from taking any further action on the original contract. The settlement agreement thus entered into has the effect of superseding or extinguishing the earlier contract, with the result that there is no longer any cause of action under the original contract to be sued upon between the parties. Likewise, a plaintiff who has signed a contract with a defendant but has subsequently executed a settlement agreement with the latter in respect of a specific cause of action under the original contract is barred from taking any further action on the said specific cause of action under the original contract

[24] This is also consistent with the principles decided by the Singapore Court of Appeal in the various cases as approved and applied by our Court of Appeal in *Pacific Sanctuary* case:

> [27] The Singapore Court of Appeal in *Indian Overseas Bank v. Motorcycle Industries [1973] Pte Ltd and Others* [1992] 3 SLR (R) 841 held:
>
> > 13 The effect of a settlement or compromise agreement is stated in *Halsbury's Laws of England* vol 37 (4th Ed) at para 391 as follows:
> >
> > > *Where the parties settle or compromise pending proceedings, whether before, at or during the trial, the settlement or compromise constitutes a new and independent agreement between them made for good consideration. Its effects are (1) to put an end to the proceedings, for they are thereby spent and exhausted; (2) to preclude the parties from taking any further steps in the action, except where they have provided for liberty to apply to enforce the agreed terms; and (3) to supersede the original cause of action altogether …*
>
> [29] The principles laid down in the *Indian Overseas Bank* (*supra*) was applied by the Singapore Court of Appeal in *Turf Club Auto Emporium Pte Ltd and Others v. Yeo Boong Hua and Others and Another Appeal And Other Matters* [2017] 2 SLR 12 where the court held *inter alia*, that *a settlement agreement which had been entered into for good consideration had the following effects*: *(a) it would put an end to the proceedings, which would thereby be spent and exhausted; (b) it would preclude the parties from taking any further steps in the action, except where they had provided in the settlement agreement for liberty to apply, in the same action, for the purpose of enforcing the agreed terms; and (c) it would supersede the original cause of action altogether*.
>
> (emphasis added)

[25] The Housing Development (Control and Licensing) Act 1966 is directed against the sale and purchase agreement in respect of residential properties and not directed against other types or categories of agreements. There is no express provision in the Housing Development (Control and Licensing) Act 1966 to prohibit the contracting parties in dispute or

controversy to enter into binding and enforceable settlement agreements or consent judgments for compromise and settlement of their disputes or controversies in connection with the sale and purchase transactions of residential properties after the completion of the development and construction of the residential properties.

[26] In order to examine and analyse whether or not such a prohibition against compromise and settlement of disputes or controversies is implied in the Housing Development (Control and Licensing) Act 1966, one has to consider the principles of statutory interpretation, the other provisions of the Housing Development (Control and Licensing) Act 1966, the judicial recognition and acceptance of compromise and settlement, the roles of mediation in disposal of court cases and the judicial encouragement of amicable settlement of civil cases through consent judgments in court.

[27] The relevant principles of statutory interpretation in this connection have been laid down in *Majlis Perbandaran Seremban v. Tenaga Nasional Bhd* [2020] 10 CLJ 715 in the judgment delivered by Zaleha Yusof FCJ wherein the Federal Court held as follows:

> [31] It is beyond dispute that each provision or part of a provision must be read in its immediate context and in the context of the Act as a whole. When words are read in their immediate context, the reader forms an impression as to their meaning. Any impression based on immediate context must be supplemented by considering the rest of the Act, including all other provisions of the Act and their various structural components. (See *Ruth Sullivan, Driedger on the Construction of States*, 3rd edn, Butterworths).
>
> [32] Therefore, we say, s. 144 of Act 171 cannot be read in isolation from the rest of the provisions in Part XV of Act 171. This is because the legislative scheme provided under Part XV under the heading of "Rating and Valuation" reflects the whole scope of the Act and the real intention of the enacting body in dealing with this issue. As such, the court must not only consider one section but all sections in Act 171, including the relation of one section to the other sections, the relation of a section to the general object intended to be secured by the Act. This is in consonance with the doctrine of harmonious construction as explained by this court in *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Muziadi Mukhtar* [2020] 1 CLJ 1, where this court held:
>
> > [78] In this regard, it would be convenient for us to discuss the doctrine of harmonious constructions. To put it simply, the doctrine of harmonious construction means a statute should be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute. Such an interpretation is beneficial in avoiding any inconsistency or repugnancy either within a section or between a section and other parts of the statute. The five main principles of this doctrine/rule are as follows:

(i) the court must avoid a head on clash of **seemingly contradictory provisions** and they must construe the contradictory provisions so as to harmonise them (see *Commissioner of Income Tax v. Hindustan Bulk Carriers* [2002] 3 SCC 57, p. 74);

(ii) **the provision of one section cannot be used to defeat the provision contained in another unless the court, despite all its efforts, is unable to find a way to reconcile their differences**;

(iii) **when it is impossible to completely reconcile the differences in contradictory provisions, the courts must interpret them in such a way that effect is given to both provisions as much as possible** (see *Sultana Begum v. Prem Chand Jain*, AIR 1997 SC 1006, pp. 1009, 1010);

(iv) courts must also keep in mind that interpretation that reduces one provision to useless or dead lumber is not harmonious construction (see *Commissioner of Income Tax v. Hindustan Bulk Carriers* [2002] 3 SCC 57, p. 74); and

(v) **to harmonise is not to destroy any statutory provision or to render it fruitless**.

[79] In a nutshell, **the doctrine requires that the legislation be construed in a way which would achieve a harmonious result**, and that construction should favour coherence in the law.

(emphasis added)

[28] As regards the other parts of the Housing Development (Control and Licensing) Act 1966, Wong Kian Keong J in *Pinpoint Consortium (M) Sdn Bhd v. Mammoth Empire Land Sdn Bhd* [2020] 5 CLJ 281 has correctly referred to the express provisions in ss. 16T and 16AB of the said Act which empower the tribunal for homebuyer claims, created by the same Act under s. 16B, to assist or facilitate the parties' negotiation of settlement, and to record the terms of the parties' settlement. The relevant express provisions of the Housing Development (Control and Licensing) Act 1966 in relation to compromise and/or settlement are as follows:

16O. Extension of jurisdiction by agreement.

(1) Notwithstanding that the amount or value of the subject matter claimed or in issue exceeds fifty thousand ringgit, the Tribunal shall have jurisdiction to hear and determine the claim if the parties have entered into an agreement in writing that the Tribunal shall have jurisdiction to hear and determine the claim.

16P. Abandonment to bring claim within jurisdiction.

(1) **A claimant may abandon so much of a claim as exceeds fifty thousand ringgit in order to bring the claim within the jurisdiction of the Tribunal**.

(2) Where a part of a claim has been abandoned under subsection (1), **the Tribunal's record of an agreed settlement under subsection 16T(3)** or the Tribunal's award under section 16Y, as the case may be, **in relation to the claim shall operate to discharge the person:**

(a) who is a party to that agreed settlement; or

(b) against whom the claim is brought and the subsequent award is made, from liability in respect of the amount so abandoned.

16T. Negotiation for settlement.

(1) The Tribunal shall, as regards every claim within its jurisdiction, assess whether, in all the circumstances, it is appropriate for the **Tribunal to assist the parties to negotiate an agreed settlement in relation to the claim**.

(2) Without limiting the generality of subsection (1), in making an assessment the Tribunal shall have regard to any factors that, in the opinion of the Tribunal, are likely to impair the ability of either or both of the parties to negotiate an agreed settlement.

(3) **Where the parties reach an agreed settlement, the Tribunal shall approve and record the settlement and the settlement shall then take effect as if it were an award of the Tribunal**.

(4) Where:

(a) it appears to the Tribunal that it would not be appropriate for it to assist the parties to negotiate an agreed settlement in relation to the claim; or

(b) the parties are unable to reach an agreed settlement in relation to the claim,

the Tribunal shall proceed to determine the dispute.

16AB. Orders and settlement to be recorded in writing.

The **Tribunal shall make or cause to be made a written record of the terms of**:

(a) every agreed settlement reached by the parties under subsection 16T(3); and

(b) every award made by it under section 16Y.

16AC. Decisions of Tribunal to be final.

(1) **Every agreed settlement recorded by the Tribunal under subsection 16T(3)** and every award made by the Tribunal under section 16Y:

(a) shall be final and binding on all parties to the proceedings; and

(b) shall be deemed to be an order of a Magistrate's Court or a Sessions Court, as the case may be, and be enforced accordingly by any party to the proceedings;

From the abovementioned express statutory provisions, it is clear that the Housing Development Act (Control and Licensing) Act recognises as well as encourages the parties' settlement as a means of resolving their claims and disputes under the statutory forms of sale and purchase agreements. Section 16P by statutorily recognising that a homebuyer can lawfully abandon part of his claim (*ie*, an act of compromise of his claim) in order to bring the claim within the jurisdiction of the Tribunal is an explicit statutory recognition of valid compromise on the part of the purchaser in order to facilitate settlement or dispute-resolution. It is undoubtably clear that where the statute expressly empowers the statutory tribunal to record settlement agreements which shall then have the effect as the awards of the tribunal with binding and enforceable effect, the settlement agreements and the awards which record the terms of the settlement agreements cannot be invalid under the statute. Section 16AC expressly stipulates that *Every agreed settlement recorded by the Tribunal under subsection 16T(3) ... (a) shall be final and binding on all parties to the proceedings; and (b) shall be deemed to be an order of a Magistrate's Court or a Sessions Court, as the case may be, and be enforced accordingly by any party to the proceedings*. In the premises there is no room for the courts to read into the Act any implied prohibition of settlement or compromise agreement made between the parties to the residential sale and purchase agreements.

(emphasis added)

[29] Compromise and settlement have been judicially recognised and accepted as a means of amicable settlement of claims and disputes since centuries ago. Settlement agreements can be considered as important to the proper and expeditious administration of justice. The vast majority of disputes are settled between the parties rather than go to court or to trial. Parties who settle their claims and disputes therefore need to have confidence in the validity and effect of their settlement agreements. "Compromise" is a word that defines a deal between the parties, where each party gives up part of their claim or demand. It is a settlement of disputes by mutual consent. In such a process the adverse claims of different parties are resolved by mutual agreement and they put an end to the litigation by way of compromise or settlement.

[30] In the recent decades, the courts in Malaysia have facilitated and encouraged mediation as a way to expedite disposal of civil cases through amicable settlement. Order 34 r. 2(2)(a) of the Rules of Court 2012 ("ROC 2012") has expressly brought the attention of the court during case management to consider mediation as a means of just, expeditious and economical disposal of cases. Order 22A on the offer to settle, the procedure and implications of acceptance of such offer has been newly added to the ROC 2012 to encourage settlement of court cases without trials. The courts have set up the mechanism and facilities for conducting mediations between litigants and for recording the terms of settlements as consent judgments. In most, if not all, amicable settlements there would be some element of

compromise whereby each party gives up part of his/her original claims or demands so as to put an end to their disputes and actual or imminent litigation. The abovementioned provisions in ROC 2012 constitute express judicial encouragement and recognition of amicable settlement of civil cases through consent judgments in court. Consent judgments which record the parties' terms of settlement are valid and binding on the parties, except where there is vitiating circumstance which vitiates the settlement *via* consent judgment on the same grounds as those which vitiate a contract: see the rather comprehensive summary of the legal principles relevant to an application for setting a consent judgment has been given by Darryl Goon Siew Chye J (now JCA) in *Stone Master Corporation Bhd v. Dato Koh Mui Tee & Ors; Dato' Lee Fong Yin (Third Party)* [2019] 1 LNS 1571 and the appellate court's decisions referred to therein.

[31] By the very nature and character of amicable settlement, if the courts were to re-open the parties' settlement agreement in the absence of any vitiating circumstance, the court would be stepping into the original shoes of the parties to re-assess the rights and liabilities of the parties on the merits and ascertain whether the terms of the amicable settlement match the rights and liabilities of the parties on merits. Invariably, re-opening the parties' amicable settlements in the absence of any vitiating circumstance will result in setting aside most, if not all, the settlement agreements and/or consent judgments made between the parties as they by their very nature and character would involve some form or extent of compromise.

[32] As the Housing Development (Control and Licensing) Act 1966 by ss. 16O, 16P, 16T, 16AB and 16AC have expressly recognised compromise and settlement of claims pending before the Tribunal as a lawful means of finally resolving the parties' disputes and claims under the residential sale and purchase agreements, there is nothing in the Act to suggest or imply that the parties must wait until their disputes and claims have been filed in the Tribunal before they can lawfully reach a binding settlement agreement.

[33] Hence, implying a prohibition against genuine compromise and settlement or amicable settlement of disputes and litigations in respect of the sale and purchase agreements on residential properties would be contradictory to the policy and purpose of the Act in ss. 16O, 16P, 16T, 16AB and 16AC thereof and would also lead to disharmony with the express provisions of the Act.

[34] Apart from the statutory formula for computing liquidated damages for delay in delivery of residential properties under the Housing Development (Control and Licensing) Act 1966, there are also other statutory provisions in other statutes which stipulate a statutory formula for computation of damages or which prescribe the damages recoverable. Examples of such other statutory provisions include s. 75 of the Contracts Act 1950, s. 7(3)(iv) of the Civil Law Act 1956, s. 28A(2)(c) and (d) of the

Civil Law Act 1956, s. 69 of the Consumer Protection Act 1999, s. 8A of the Housing Development (Control and Licensing Act) 1966; ss. 55, 56, 57, 59 and 61 of the Sale of Goods Act 1957; s. 13 of the Employment Act 1955; Employment (Termination and Lay-Off Benefits) Regulations 1980; etc.

[35] If compromise and settlement is held by the courts to be impliedly prohibited by the Housing Development (Control and Licensing) Act 1966, then jurisprudentially there is no logical reason for not implying the similar prohibition in respect of the other statutory provisions which stipulate a statutory formula for computation of damages or prescribe the damages recoverable. Ultimately, the eventual end result is that a great bulk of the civil cases cannot be valid and binding subject-matters of amicable settlements or consent judgments and the courts would be overwhelmed with compulsory trials and hearings of such civil cases.

[36] Taking into account the abovementioned statutory principles and policies, this court held on 29 April 2022, that there is nothing in the Housing Development (Control and Licensing) Act 1966 which impliedly prohibits the contracting parties in dispute or controversy to enter into binding and enforceable settlement agreements or consent judgments for compromise and settlement of their disputes or controversies in connection with the sale and purchase transactions of residential properties after the completion of the development and construction of the residential properties or after the dispute has arisen between the parties.

[37] In the circumstances of our present case, the settlement agreements were signed between the defendant/developer and each of the plaintiffs to fully and finally settle the plaintiffs' original causes of action in respect of delay in delivery of vacant possession and the delay in completion of common facilities. None of the plaintiffs has pleaded or alleged any vitiating circumstance which can be argued as having invalidated any of the settlement agreements as a contract.

[38] In the premises, the original causes of action of the plaintiffs in respect of delivery of vacant possession and delay in completion of common facilities under the original sale and purchase agreements have been superseded by the settlement agreements and the plaintiffs have ceased to have any right to sue on such superseded original causes of action. As the causes of action are now merged into and becomes the subject of the settlement agreements and the settlement agreements have fully been implemented by the defendant, there is no remaining or residual cause of action for any of the plaintiff to sue the defendant in respect of the delivery of vacant possession and delay in completion of common facilities.

[39] In the premises, this court held that in light of the settlement agreements which have been fully implemented by the defendant, none of the plaintiffs herein can have any subsisting cause of action to sue the defendant in respect of the delay in delivery of vacant possession and the delay in completion of common facilities.

[40] On this ground, it is clear and obvious that the plaintiffs' claims against the defendant, which are in respect of the delay in delivery of vacant possession and the delay in completion of the common facilities, are obviously unsustainable and/or are clearly bound to fail and/or have no chance of success. Hence, there is no triable issue for the present suit to proceed to trial.

[41] On this ground alone, it is a clear and obvious case for summarily striking out the plaintiffs' present suit under O. 18 r. 19 of the ROC 2012.

[42] As the plaintiffs' aforesaid original causes of action have been superseded and spent, there is no necessity to consider the merits or demerits of the parties' original claims or defences.

[43] In the premises this court held that the subordinate court has erred in law and/or in principle in dismissing the defendant's application for striking out the plaintiffs' present action.

[44] The decision of this court on this point regarding the validity of settlement agreement between the developer and the purchasers is also consistent with the decisions of the High Court by Wong Kian Kheong J in *Pinpoint Consortium (M) Sdn Bhd v. Mammoth Empire Land Sdn Bhd* [2020] 5 CLJ 281, by Mohd Firuz Jaffril J in *Obata Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Other Cases* [2021] 10 CLJ 596 and by Mohd Arief Emran Ariffin JC in *Chin Kok Woo & Ors v. Sky Park Properties Sdn Bhd & Ors* [2022] 4 CLJ 716 wherein the High Court in these three cases came to the same conclusion as this court that the Housing Development (Control and Licensing) Act 1966 does not prohibit the parties' settlement of their claims and disputes in respect of the Schedule H of the sale and purchase agreements. The relevant passages of the reported judgment in *Chin Kok Woo & Ors v. Sky Park Properties Sdn Bhd & Ors*, which have also gathered the relevant case authorities on this specific point, are reproduced below:

> [55] The plaintiffs' counsel then refers to the decision of my learned brother Quay Chew Soon JC in *Leong Keng Chiang v. Prema Bonanza Sdn Bhd* [2021] 1 LNS 659; [2021] MLJU 714. This decision however is inconsistent with the position adopted by Wong Kian Kheong J in *Pinpoint Consortium (M) Sdn Bhd v. Mammoth Empire Land Sdn Bhd* [2020] 5 CLJ 281 and Mohd Firuz Jaffril J in *Obata Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Other Cases* [2021] 10 CLJ 596.
>
> [56] Wong Kian Kheong J in *Pinpoint Consortium (M) Sdn Bhd v Mammoth Empire Land Sdn Bhd* (*supra*) held:

[16] *I am of the view that housing developers and home buyers may enter into settlement agreements to settle any dispute arising from SPA concerning housing accommodation. The reasons for this view are as follows*:

(i) housing developers and home buyers have the freedom of contract to enter into settlement agreements regarding housing accommodation (please see the judgment of Gopal Sri Ram FCJ in the Federal Court in *Berjaya Times Squares Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597, at para. [10]). Such a freedom can only be restricted or abrogated by clear words of written law;

(ii) settlement agreements are valid under s. 64 CA. I reproduce below the relevant part of s. 64 CA:

(iii) there is nothing in HDA and HDR which invalidates a settlement agreement concluded under s. 64 of the CA. Nor is there any provision in HDA and HDR which requires the controller to approve or consent to the settlement agreement before the settlement agreement can take effect. Regulation 11(3) of the HDR does not invalidate any SPA between a housing developer and home buyer, let alone a settlement agreement ...;

(v) there is a rebuttable statutory presumption that Parliament is deemed to know existing law (please see Gopal Sri Ram JCA's (as he then was) judgment in the Court of Appeal case of *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520; [1995] 1 MLJ 719, at p. 754). When the Legislature passed HDA (in 1966) and subsequent amendments to HDA (subsequent amendments), the Legislature is deemed to know about the existing s. 64 of the CA. If Parliament had intended HDA to override s. 64 of the CA regarding settlement agreements, Parliament would have expressly done so when Parliament passed HDA and subsequent amendments. Parliament however did not do so. On the contrary, Parliament has passed A1142 which provides for the tribunal to assist in the negotiation of a settlement agreement and to record such an agreement. It is therefore clear that the Legislature has not intended for HDA to invalidate settlement agreements between housing developers and home buyers;

(vi) in the Court of Appeal case of *Oxbridge Height Sdn Bhd v. Abdul Razak Mohd Yusof & Anor* [2015] 2 CLJ 252, at paras. [23]-[25] and [30], Mohamad Ariff Yusof JCA has recognised the validity of a settlement agreement between a housing developer and home buyer as follows:

> [23] In our view, the substance of the appeal turned on the validity of the settlement agreement. It seemed to us obvious on the evidence that the respondents (especially the first respondent) had expressly agreed

to waive the LAD claimable under the SPA. It could not be said this waiver was a mere suggestion. Why would the respondents execute the settlement agreement except to agree to waive the earlier LAD and to accept the new completion date? ...

[24] On the law, the signing of the settlement agreement would fall within the terms of s. 64 [CA] which deals with the "dispensation" of a promise made to a promisee: ...

[25] The appellant's claim could only be defeated if the settlement agreement was illegal and flouted s. 24 [CA], as either an agreement forbidden by law, or of such a nature as would defeat any law, or would be opposed to public policy. In this appeal, the respondents took a firm view on the effect of the [HDA] and reg. 11(1) [HDR], in effect arguing that the LAD provision in the Schedule G standard form SPA could not be contracted out ...

[30] ... In terms of policy, there should be nothing illegal in law for a settlement agreement to be negotiated with the full participation and direction from JPN with a view to save a failing housing project from being an abandoned project. It will be in the public interest, and in the interest of house buyers, if the law allowed a regulated settlement and waiver of LAD on terms as specified in the settlement agreement which was the subject matter of this appeal. It was therefore not right and proper for the respondents, despite their promise to conditionally waive LAD under the SPA, to resile from their promise and sue for late delivery under the SPA as if the settlement agreement did not exist.

As a matter of stare decisis, the Court of Appeal's decision in *Oxbridge Height* (*supra*) is binding on this court; and

(vii) it is in the public interest for the law to recognise the validity of settlement agreements. Through amicable settlements, all disputes regarding SPA's of housing accommodation may be finally, expeditiously and economically disposed. Needless to say, if disputes regarding SPA's of housing accommodation are amicably resolved by way of settlements agreements, the courts will not be burdened with these disputes.

[17] Section 24 CA provides as follows:

What considerations and objects are lawful, and what not.

24. The consideration or object of an agreement is lawful, unless:

(a) it is forbidden by a law;

A

(b) it is of such a nature that, if permitted, it would defeat any law;

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or

B

(e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void. (emphasis added).

C

In view of the reasons explained in the above para. 16, it is clear that SA is not illegal and void under s. 24(a), (b) and (e) of the CA.

[18] It is to be noted that the SA is a new agreement to settle the claimed sum. Accordingly, the SA does not constitute an attempt to contract out of HDA and HDR.

D

[19] I should add that none of the cases cited by the plaintiff have decided that a settlement agreement between a housing developer and home buyer of housing accommodation is invalid under HDA and HDR.

E

[57] I also find that my learned brother Mohd Firuz Jaffril J had also taken a similar approach in *Obata Ambak Holdings Sdn Bhd* (*supra*):

[62] The plaintiffs' counsel cited the case of *Oxbridge Height Sdn Bhd v. Abdul Razak Mohd Yusof & Anor* [2015] 2 CLJ 252 to argue that the LAD provision in the SPA has a statutory force of law and cannot be contracted out.

F

[63] Contrary to the observations of the plaintiffs' counsel, Ariff Yusoff JCA in the case of *Oxbridge Heights* (*supra*) referring to s. 64 of the Contracts Act 1950, affirmed the settlement agreement entered into between the developer and the purchaser. The court proceeded on the basis that there is no full contracting out of the LAD provision in the SPA and that the National Housing Department (JPN) was brought into the picture and kept fully appraised of the status of the housing project and the settlement agreement:

G

H

... Thus, even in the settlement agreement there was no total contracting out of the LAD provision in the SPA. If delivery of vacant possession had not been delivered by the new completion date, the respondents would have been at liberty to sue on the basis of the original LAD provision. We therefore found that on the peculiar facts of this appeal, there was no full contracting out and no situation where the purpose of the housing legislation being "to protect the weak

I

against the strong" was ousted. In terms of policy, there should be nothing illegal in law for a settlement agreement to be negotiated with the full participation and direction from JPN with a view to save a failing housing project from being an abandoned project. It will be in the public interest, and in the interest of house buyers, if the law allowed a regulated settlement and waiver of LAD on terms as specified in the settlement agreement which was the subject matter of this appeal. It was therefore not right and proper for the respondents, despite their promise to conditionally waive LAD under the SPA, to resile from their promise and sue for late delivery under the SPA as if the settlement agreement did not exist.

[64] Similarly in the present case, I am of the view that there is no full contracting out of the signed SPA given that the plaintiffs were entitled to, if not had been duly compensated based on the terms of the signed SPAs. It cannot be said that the settlement agreements are of no legal effect on the basis that they diminished or took away the statutory rights of the house buyers.

[65] Having reviewed the submissions of both parties, I am of the view that the difference between the case of *Oxbridge Heights* (*supra*) and that in *Hedgeford Sdn Bhd* (*supra*) is negligible as this court only has to consider whether there is a presence of an evidence that the plaintiffs had agreed to accept the amount offered as the full and final settlement in respect of their rights. A "regulated settlement" of the Oxbridge type is only advisable but not necessary.

[58] Having had the opportunity to consider the decisions of the High Court, I find the decision of Wong Kian Kheong J and Mohd Firuz Jaffril J to be persuasive and I agree with the position adopted by them in the above-referred cases. I, therefore, find that the settlement agreement executed by the plaintiffs and the first defendant is binding on parties and, therefore, bars the plaintiffs from making any further claims relating to the late delivery of the said units.

...

[74] Therefore, based on the aforesaid, I agree with the first defendant's arguments and that the claim against it should be struck out.

[75] I find that the plaintiffs cannot reopen the issue of liquidated damages again as they have either (i) pursued the claims before the housing tribunals and (ii) that they have settled their claims in full as seen in the settlement agreements executed and shown in the affidavit in support filed by the first defendant.

[76] I am aware that the Housing Development (Control and Licensing) Act 1966 is a piece of social legislation and is intended to protect purchasers. However, this does not mean that this court should disregard

any settlement agreement that was entered between the plaintiffs and the defendants that was entered into to finalise any liquidated ascertained damages claimed by the said plaintiffs. Such agreements were not specifically prohibited by legislation, and I, therefore, find that the plaintiffs' claims are frivolous and vexatious against the first defendant.

[77] The sword of justice cuts both ways. I am of the opinion that this court should not merely protect purchasers but should also prevent any attempt to reopen litigation that has been either litigated before a competent tribunal or settled amicably.

(emphasis added)

Conclusion

[45] In the premises, this court allowed the defendant-developer's appeal and ordered that the plaintiffs-purchaser' action and claims herein be struck out with costs.

[46] This court also awards to the defendant-developer the combined costs here and below of RM8,000, subject to allocator.